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PP

v.

MASANA & ANOR

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HIGH COURT MALAYA, KUANTAN
AKHTAR TAHIR JC
[CRIMINAL TRIAL NO: 45A-3-2009]
19 AUGUST 2010

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Prima facie case - Whether established - Charge - Trafficking in drugs at car park of resort - Prosecution seeking to prove possession of drugs in car - Presumption of trafficking - Whether charge misleading and untenable - Whether defective - Control and possession of vehicle - Possession of drugs - Whether common intention proved - Relationship of - Factors to consider - Whether accused had custody, control or knowledge of drugs*

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CRIMINAL PROCEDURE: *Charge - Whether defective - Trafficking in drugs at car park of resort - Prosecution seeking to prove possession of drugs in car - Presumption of trafficking - Whether charge misleading and untenable*

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Both the accused were jointly charged under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') for trafficking in 73.77 grams of methamphetamine and 21.37 grams of heroin respectively at a car park of a resort in Cherating, Kuantan. Upon receiving information from a source, DSP Xavier ('SP4') together with his men raided a Thailand registered car driven by the second accused which was parked at the resorts' car park. SP4 found that the first accused and two children were seated as well in the said car. Further, upon examination, SP4 found a black package which contained 4,950 pills and 15 bottles of white powdery substance located at the footrest space where the first accused was seated. On analysis, the chemist confirmed that the pills and the white powdery substance contained drugs which fell within the definition of dangerous drugs under the Act. The investigation officer ('SP6') contended that the car from which the drugs were found belonged to one Mr Bueraheng who was a resident of Thailand. Further, SP6 confirmed that the two children found in the said car were the children of Mr Bueraheng. In determining whether a *prima facie* case had been proven, the court considered the following issues, *ie*, (i) the charges (ii) possession of the vehicle (iii) possession of the drugs against both accused and (iv) possession of the drugs against either accused.

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Held (acquitting and discharging both accused):

(1) A literal reading of the charges gave a picture that both accused were trafficking in drugs at the car park of the resort. However, the evidence led by the prosecution drew a different picture wherein it was shown that the drugs were actually found in a car and the police had raided the car the moment it stopped at the car park. Further, the car being an important element in the offence was not even mentioned in the charge. The prosecution was seeking to prove possession of the drugs found in the car against both accused and to raise the presumption of trafficking based on the amount of drugs found. Hence, the charges were misleading and untenable. (paras 13, 14 & 15)

(2) In all drug trafficking charges, the prime ingredient that has to be proven is possession and if the drugs were found in a vehicle, proof of possession of the vehicle becomes important, especially where the vehicle did not belong to either of the accused. (para 16)

(2a) Without the evidence of the owner, it could not be established as to what circumstances, when and where the vehicle was given to either of the accused. The condition of the vehicle when it was given could not also be established. The control and possession of the vehicle was of paramount importance to show or from which to infer as to whom the items in the car belonged to. Hence, there were numerous inferences that could be drawn under such circumstances and it is the law that only inferences favourable to the accused should be accorded. (paras 18, 19 & 20)

(3) The prosecution had failed to prove the relationship between both the accused nor as to how they met and what they were doing together. Further, there were three groups of people in the car and the court had no clue as to what was the relationship between them, from where they came or their intention of coming to Kuantan. Thus, the prosecution had failed to prove common intention between both accused which was a necessary ingredient of the charges against them. (paras 24 & 25)

(4) The proximity of the first accused to the drugs could not raise an inference of custody, control nor knowledge as the drugs could not be seen from the outside although they did emanate a smell. However, a person unfamiliar with drugs would not be able to determine that it was the smell of drugs. (para 26)

(5) The only evidence against the second accused was that he was the driver of the vehicle in which the drugs were found and this was insufficient to raise an inference of custody, control or knowledge. (para 27)

Case(s) referred to:
Dorai Pandian Munian & Anor v. PP [2009] 1 LNS 234 CA ***(refd)***
Roslan Abdullah v. PP [2010] 1 CLJ 685 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152, 153, 154, 180
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2)
Penal Code, ss. 34, 304(b)

For the 1st appellant - M/s Hasif & Co
For the 2nd appellant - M/s Ahmad Zaidi & Partners
For the PP - Mahadi Abdul Jumaat (Hidayatul Syuhada Shmasudin with him); DPP

Reported by Kumitha Abdul Majid

JUDGMENT

Akhtar Tahir JC:

[1] The accused in this case were charged as follows:

(1) Bahawa kamu bersama-sama pada 8 September 2008, jam lebih kurang 8.30 malam, bertempat di tempat letak kereta Holiday Villa Resort & SPA, Cherating, di dalam daerah Kuantan, di dalam Negeri Pahang, telah didapati mengedar dadah berbahaya jenis Methamphetamine berat bersih 73.77 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

(2) Bahawa kamu bersama-sama pada 8 September 2008, jam lebih kurang 8.30 malam, bertempat di tempat letak kereta Holiday Villa Resort & SPA, Cherating, di dalam daerah Kuantan, di dalam Negeri Pahang, telah didapati mengedar dadah berbahaya jenis Heroin berat bersih 21.37 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

[2] The narration of events leading to the arrest of both the accused is best seen from the evidence of SP4 DSP Xavier a/l Soosainatahan. According to SP4 on 7 September 2008 he received information from a

source that there would be a sale and purchase of drugs at Holiday Villa Resort & SPA (the Resort), Cherating involving a man and woman using a Thailand registered vehicle on 8 September 2008 between 7 to 9pm.

[3] On receiving this information SP4 gathered his men to brief them on the information as well as to plan out the arrest of the suspects. For this purpose he divided his men into five groups to be posted at the various places at the Resort. The first group was led by SP4 himself and he and his men were at the resort at 7pm.

[4] What transpired at the resort in the words of SP4 is as follows:

> Lebih kurang 8.00 mlm, hujan telah turun dengan lebat dan telah reda lebih kurang selepas 15 minit dan jam lebih kurang 8.20 mlm, kumpulan kelima iaitu anggota yang menjaga di perhentian bas atau yang membuat pemerhatian di perhentian bas di hadapan Holiday Villa telah melaporkan terdapat satu kenderaan berwarna putih berpendaftaran Thailand telah datang dari arah Kemaman memberi isyarat untuk memasuki kawasan Holiday Villa dan apabila kenderaan itu menghampiri jalan masuk ke Holiday Villa, anggota tersebut telah melaporkan ia cuma nampak kenderaan berwarna putih dan tidak diketahui berapa orang dalam kenderaan tetapi pendaftaran Thailand.
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> Seterusnya, saya telah memaklumkan kepada semua kumpulan untuk bersiap sedia bagi mengambil tindakan. Kedudukan saya adalah di kawasan parking lot menghala ke chalet di mana saya bersama Sjn Zul berada dalam kereta saya sendiri dan tidak lama lebih kurang 1 atau 2 minit, Det. Anthony melaporkan kepada saya tentang kemasukan kenderaan berpendaftaran Thailand menghala ke Holiday Villa. Saya dapati kenderaan itu telah diletakkan di parking berdekatan dengan kenderaan saya, jarak lebih kurang 2 parking lot dan tidak ada kereta di antara kereta sasaran dengan kereta saya.
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> Saya dapati pemandu adalah seorang lelaki kerana setelah parking, lelaki itu telah menurunkan cermin dan telah membuka lampu di dalam kenderaan dan membuat pemerhatian diluar. Saya dapati enjin kereta masih hidup dan lampu besar masih menyala.
>
> Semasa itu lebih kurang pukul 8.40 mlm, saya telah memaklumkan kepada semua pasukan untuk bertindak membuat tangkapan dan tidak sampai 1 minit kenderaan Land Rover yang diketuai oleh Kpl. Fauzi iaitu kumpulan kedua telah sampai dan membuat halangan di bahagian belakang kereta sasaran dimana kedudukan kereta sasaran adalah bahagian muka menghadap ke chalet dan halangan dibuat dibahagian belakang.
>
> Sejurus sahaja halangan dibuat, saya bersama Sjn Zul telah keluar daripada kenderaan saya menghala ke kenderaan sasaran dan menjerit dengan perkataan 'polis' serta 'jangan melarikan diri' tetapi pemandu

A iaitu seorang lelaki telah sempat membuka kereta dan melarikan diri. Sjn Zul bersama Kpl. Rosli berjaya menghalang dan menangkap lelaki tersebut iaitu dalam jarak 5-10 meter kemudian lelaki tersebut telah dibawa ke kenderaan tadi dan semasa itu juga Kpl. Rohaini telahpun berada dibahagian penumpang dan apabila saya sampai kenderaan tersebut, saya dapati seorang perempuan berada didalam bahagian
B hadapan penumpang dan 2 orang kanak-kanak berada dibahagian belakang.

Seterusnya dengan disaksikan oleh lelaki yang ditangkap dan perempuan yang juga ditangkap, saya telah membuat pemeriksaan ke atas kenderaan tersebut di mana no pendaftarannya adalah MJ 7113
C Bangkok iaitu kereta Toyota Fortuner warna putih. Dalam pemeriksaan tersebut, saya telah menjumpai satu bungkusan plastik berwarna hitam yang diletakkan / berada ditempat letak kaki bahagian penumpang hadapan.

[5] On opening the black package SP4 found 4,950 pills in 25 blue
D plastic packets and 15 bottles containing white powdery substance. All this packets together with their contents were subsequently sent by the Investigating Officer Inspector Mohd Rafidzan b Mohd Nadzri (SP6) to the Chemistry Department at Kuantan and received at the Chemistry Department by Chemist Khairul Hadi bin Haji Abdul Raof (SP3).

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[6] On analysis SP3 confirmed that the pills contained methamphetamine whereas the white powdery substance contained heroin. Both this drugs fall within the definition of Dangerous Drugs under the Dangerous Drugs Act 1952.

F **[7]** A further fact revealed by the Investigating Officer SP6 was that the vehicle from which the drugs were found belonged to one Mr Bueraheng, a resident of Golok, Thailand. The prosecution attempted to tender the Thailand Registration Card which I disallowed for the reasons that the Registration Card was merely a photostat and also a
G foreign country document. SP6 further testified that from information received by him, the owner of the car Mr Bueraheng had died and I therefore allowed a postponement of one day for SP6 to get the Death Certificate. On resumption of the trial SP6 produced a Thailand Death Certificate which I disallowed to be tendered because it was a photostat
H and certified to be a true copy by the Police Officer from Kota Bahru and not by any Thai officials.

[8] A final fact worth noting in this case was that apart from the two accused found in the car at the time of their arrest, there were also two children in the car whom SP6 confirmed were the children of Mr
I Bueraheng the owner of the car.

The Decision At The End Of The Prosecution's Case

[9] It is trite law in a criminal trial, that at the end of the prosecution case the burden is upon the prosecution to prove a *prima facie* all ingredients of charges faced by the accused. Numerous cases have enumerated the test in determining whether a case has been proven on a *prima facie* basis.

[10] For the purpose of this case 1 wish to quote from the case of *Roslan Abdullah v. PP* [2010] 1 CLJ 685. At pp. 688-689 that stated as follows:

> That issue, whether it was the duty of the prosecution to establish a *prima facie* case or a beyond reasonable doubt case was settled by a seven-judge panel of the Federal Court (Anuar CJ and Mohd Azmi FCJ dissenting) in *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597 FC, who held that the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt, which therefore would call for a maximum evaluation of the evidence tendered by the prosecution.
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> That should have settled the issue at long last. But that was not to be. On 31 January 1997, s. 180 of the Criminal Procedure Code, was amended to the following to require the prosecution to only make out a *prima facie* case at the end of its case.
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> **180. Procedure after conclusion of case for prosecution**
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> (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.
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> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
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> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
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> It would take a further statutory amendment (Criminal Procedure Act 2006, in force since 6th March 2007) to statutorily define "a *prima facie* case" as 'where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.'
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> In *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1, Zaki Azmi PCA, he then was, imparted the following commentary on the development of the law, from *Haw Tua Tau* to the present position:

> Prior to this amendment, as a result of the decision in *Haw Tua Tau v. PP* [1981] CLJ 123; [1981] CLJ (Rep) 11, there had been heated discussions on the term *prima facie* in relation to burden of proof at the close of the prosecution case. After the amendment, the discussions on this subject continued culminating in *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, both Federal Court judgments. Since then, Parliament has introduced the definition of *prima facie*. That term is now defined as 'where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

That uncertainty, if any, until settled by the Criminal Procedure Act 2006, was only in relation to the "*prima facie* case". In relation to the evaluation of the prosecution evidence, it has long been settled that the evaluation could not be suspended until after the close of the entire case. That has been the law since *Khoo Hi Chiang*, where it was held that "the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible – the *Haw Tua Tau* test – but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt". In *Tan Boon Kean*, it was held "that at the close of the case for the prosecution, the duty of the court is to carry out a maximum evaluation of the evidence ...". And in *Arulpragasan a/l Sandaraju*, it was held that the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt, which would therefore call for a maximum evaluation of the evidence tendered by the prosecution.

Yet, the duty of a trial court at the end of the prosecution case remained the same, despite the 1997 amendment to s. 180 of the CPC. In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA, Gopal Sri Ram JCA (as he then was) held that the one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case is to subject the prosecution is to "undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established". Later, in *PP v. Mohd Radzi bin Abu Bakar* (cited to but was not paid heed to by the learned trial judge), the Federal Court reverted to the phrase 'maximum evaluation of the prosecution evidence' to describe the test to be applied, and then provided the following guide to trial courts.

> For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) At the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a *prima facie* case has been made out and the defence should be called. If the answer is 'No' then, a *prima facie* case has not been made out and the accused should be acquitted;

(iii) After defence is called, if the accused elects to remain silent, then convict;

(iv) After defence is called, if the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 1 LNS 82.

Since *Khoo Hi Chiang*, it has been the law that a trial court must evaluate the prosecution evidence at the end of the prosecution case. There could be no question about it; the suspension of the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence in the instant case was a serious, serious misdirection of the first order, for with suspension of the question of the veracity and accuracy of recollection of witnesses until after the close of the case, there could not consequently have been the *prima facie* case as enunciated in *Balachandran* when the appellant was called to enter upon his defence.

[11] Being guided by the above authority, I set about the task in determining whether a *prima facie* case had been proven in this case.

Defective Charge

[12] However before embarking on the task of looking at the evidence, I first looked at the charges faced by the accused. The importance of a charge and its accuracy cannot be underestimated and this can be seen from the various provisions of the Criminal Procedure Code itself. For ease of reference the provisions are set down in full as follows:

152. Form of charge

(1) every charge under this Code shall state the offence with which the accused is charged.

A (2) if the law which creates the offence gives it any specific name the offence may be described in the charge by the name only.

(3) if the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

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(4) the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) the fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence

C charged was fulfilled in the particular case.

(6) …

153. Particulars as to time, place and person

(1) the charge shall contain such particulars as to the time and place

D of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) …

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154. When manner of committing offence must be stated

When the nature the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also

F contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[13] A literal reading of the charges in this case gives a picture that both the accused were trafficking drugs at the car park of the resort. The evidence led by the prosecution however draws a different picture.

G The evidence show that the drugs were actually found in a car and the police had raided the car the moment the car stopped at the car park.

[14] The car being an important element in the offence, is not even mentioned in the charge. It was clear from the evidence that the

H prosecution was seeking to prove possession of the drugs found in the car against both the accused and only seeking to raise the presumption of trafficking based on the amount of drugs found.

[15] To me both the charges in this case are misleading and untenable and reason enough to dismiss the case. However I went on further to

I consider the evidence in this case to determine whether the case could be salvaged.

Possession Of The Vehicle

[16] As in all drug trafficking charges, the prime ingredient that has to be proven is possession and in my mind if the drug is found in a vehicle; proof of circumstances of possession of the vehicle becomes equally important as possession of the drugs itself, especially in a case where the vehicle does not belong to either of the accused.

[17] In this case it is unfortunate that the owner of the vehicle could not be brought to court to testify believing the testimony of the Investigating Officer that the owner had died although the death could not be proven.

[18] Without the evidence of the owner, it could not be established under what circumstances the vehicle was given to either of the accused and when and where the vehicle was given. It could not also be established the condition of the vehicle when it was given. Without this evidence numerous queries come to mind as to the manner of possession of the vehicle by both the accused.

[19] The control and possession of the vehicle is of paramount importance to show or from which to infer to whom the items in the car belong to. If the children of the owner could be found in the car there is no reason that other items found in the car could not also belong to the owner and of which neither of the accused are aware of.

[20] There are therefore numerous inferences that can be drawn under such circumstances and it is the law that only inferences favourable to the accused should be accorded.

Possession Of The Drugs Against Both Accused

[21] Coming close to the heels of prove of possession of the vehicle is the proof of possession of the drugs itself. For possession of drugs the prosecution had sought to rely on the provision of common the intention to prove possession of the drugs against both the accused.

[22] The provision of common intention as contained in s. 34 of the Penal Code read as follows:

> When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if the act was done by him alone.

[23] Principle of common intention has been discussed in numerous cases but for purposes of this case I will only rely on the case of *Dorai Pandian Munian & Anor v. PP* [2009] 1 LNS 234 where it was stated as follows:

A On the question of common intention, learned counsel for the first accused contended that the learned trial judge was wrong when he held that the first accused had the common intention to kill. Referring to the judgment of learned trial judge, he pointed out that even after the stabbing of Ah Soon and Ah Leong, the learned judge found no evidence that the first accused shared any common design. Learned B counsel submitted that the first accused had given evidence under oath and that his defence might be true. He prayed that the first accused be acquitted of the first charge. Alternatively, he urged us to consider returning a verdict of guilty only of an offence under section 304(b) of the Penal Code.

C The learned trial judge had referred to various familiar authorities on section 34 of the Penal Code including the decision of this court in *Sabarudin Non & Ors v. PP & Other Appeals* [2005] 1 CLJ 466. In that case this court recognized the need to interpret section 34 having regard to modern technological advances. In delivering the judgment of the court, Gopal Sri Ram JCA said at pages 51 - 52:

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> The main point made and emphasized by both learned counsel for the fourth and fifth accused is that there must be presence and participation for s. 34 to bite. They argue that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done unto E death, nor at the scene where her body was cast into the ravine s.34 has no application to the fourth and fifth accused. With respect, as a matter of law, we are unable to agree with this submission. In our judgment, presence in every case is not necessary for s. 34 to apply. In our judgment, s. 34 should be interpreted having regard to modern technological advances. F The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s. 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an G interpretation of the section made at a time when science was at a very early stage of development. We find support for our view from the judgment of Thomas J in *Suresh v. State of Uttar Pradesh*, where his lordship said:
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> > Even the concept of the presence of the co-accused at the scene H is not a necessary requirement to attract s. 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targetted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of I the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common

> intention can be implemented. We do not find any reason why s. 34 cannot apply in the case of those two persons indicated in the illustrations.
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> Thus to attract s. 34 IPC two postulates are indispensable: (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person; (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
>
> Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of s. 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s. 32 IPC. So the act mentioned in s. 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg, a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section.

[24] In this case far from proving common intention the prosecution had even failed to prove the relationship between the first and second accused nor how they had met and what they were doing together. The matter turned more complicated when it was revealed that the children found in the car did not belong to either accused but were the children of the owner of the car. In this case therefore there were three groups of people in the car without the court having a clue what was the relationship between them, where they had come from or their intentions of coming to Kuantan.

[25] The prosecution had therefore totally failed to prove common intention between both the accused; a necessary ingredient of the charges against both the accused.

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Possession Of Drugs Against Either Accused

[26] I went further to determine whether the drugs found could be attributed to either accused, bearing in mind the circumstances of this case. The only evidence against the first accused was that the package containing the drugs was found at the place she was sitting but under the circumstances of this case proximity of the first accused to the drugs could not raise inference of custody or control nor knowledge as the drugs could not be seen from the outside, although they did emanate a smell. However a person unfamiliar with drugs would not be able to determine that it was the smell of drugs.

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[27] The only evidence against the second accused was that he was the driver of the vehicle in which the drugs were found. This again is insufficient to raise an inference of custody, control or knowledge.

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[28] In the upshot, the prosecution had failed to prove the most material ingredient of the charges against both the accused, that of possession of the drugs and therefore I found both the accused not guilty of the charges against them and discharged and acquitted them of the charges.

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